Supreme Court, U.S.
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SUPREME COURT, U. S.

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1971

No. 71-505

SIDNEY TUCK,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Joseph G. Jue,
1090 Montgomery Street
San Francisco, CA 94133

Attorney for Petitioner,
Sidney Tuck

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I.

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II.

The Jury was not properly instructed on the elements of forgery.

III.

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IV.

The presentation of the defense by Defendant's counsel was so inadequate that Defendant was effectively denied his Sixth Amendment Right to Counsel.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner, Sidney Tuck, respectfully prays for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit to review its judgment affirming a judgment of the United States District Court for the Eastern District of California, i.e., affirming a conviction of violations of Section 495, of Title 18 U. S. C.

Opinions Below.

No opinion was written by the trial court. Trial was by jury.

No opinion was written by the Circuit Court. The record has not been lodged with the Clerk of this Court. A copy of the order of the Circuit Court is attached hereto as Appendix "A".

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[1]The Record is three volumes. Volume One is the Clerk's record of the proceedings before the District Court. The other two volumes being the Reporter's Transcript before the District Court. We will hereafter refer to the Clerk's Transcript as C. T. and the Official Court Reporter's Transcript as R. T.

Grounds on Which the Jurisdiction of This Court Is Invoked.

1. The date of the judgment sought to be reviewed is September 8, 1971. The time of its entry is September 9, 1971.

2. The statutory provisions believed to confer on this Court jurisdiction to review the judgment in question by writ of certiorari are 28 U.S.C. 1254 (1) and Rule 22 of this Court.

STATUTES INVOLVED

The defendant-appellant, petitioner herein is being prosecuted under Section 495 of Title 18, U.S.C., which provides in pertinent part:

495. Contracts, deeds and powers of attorney.

Whoever falsely makes, alters, forges or counterfeits any deed, power of attorney, order, certificate, receipt, contract, or other writing, for the purpose of obtaining or receiving, or of enabling any other person, either directly or indirectly , to obtain or receive from the United States or any officers or agents thereof, any sum of money; or

Whoever utters or publishes as true any such false, forged, altered, or counterfeited writing, with intent to defraud the United States, knowing the same to be false, altered, forged, or counterfeited; or

Whoever transmits to, or presents at any office or officer of the United States, any such writing in support of, or in relation to, any account or claim, with intent to defraud the United States, knowing the same to be false, altered, forged, or counterfeited--

Shall be fined not more than $1,000 or imprisoned not more than ten years, or both. June 25, 1948, c. 645, 62 Stat. 711.

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution:

> Amendment VI - Jury Trial for Crimes, and Procedural Rights.
>
> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.

QUESTIONS PRESENTED FOR REVIEW

1. Whether, as we contend, the jury was properly instructed on the law of coercion is a defense.

2. Whether, as we contend, the jury was not properly instructed as to what constitutes the elements of forgery.

3. Whether, as we contend, the Court erred in failing to admonish the jury to disregard testimony to which objections were sustained.

4. Whether, as we contend, the presentation of the defense by defendant's counsel was so inadequate that defendant was effectively denied his Sixth Amendment right to trial by an impartial jury.

5. Whether, as we contend, the United States Attorney was guilty of misconduct in the course of his argument to the jury.

STATEMENT OF THE CASE

Defendant was indicted on 12 counts of violation of Title 18, United States Code, Section 495 for forgery and altering of checks, issued by the United States. Six counts of the indictment were for forging the names of the individual payees and the other six counts were for altering each of said six checks. Trial by jury was had in the United States District Court, for the Eastern District of California, before the Honorable M. D. Crocker. Defendant was convicted and sentenced to one (1) year confinement, ordered to pay a fine of $2,200.00. Execution of judgment was suspended pending filing of completion of an appeal. A Notice of Appeal was only filed. On September 8, 1971, the United States Court of Appeals affirmed the judgment of conviction.

STATEMENT OF FACTS

Defendant was in the business of preparing income tax forms. In the course of his business, he had prepared six income tax returns relative to the refund checks which were allegedly forged and uttered by defendant.

Defendant admitted to endorsing the checks, but offered testimony that he thought he had been granted authority by the payees to endorse the checks on their behalf.

Defendant also offered evidence of a defense of coercion, testifying to extortion by an unknown party who threatened his life and the lives of his parents. Defendant further testified that fear for the safety of his parents was the reason he cashed the checks; he needed the money to pay the extortionist.

The six checks involved are plaintiff's Exhibit No. 2 (R. T. p. 39), plaintiff's Exhibit No. 4 (R. T. p. 68), plaintiff's Exhibit No. 6 (R. T. p. 104), plaintiff's Exhibit No. 9 (R. T. p. 117,) plaintiff's Exhibit No. 10 (R. T. p. 150) and plaintiff's Exhibit No. 12 (R. T. p. 206).

Marlene Tashima identified Sidney Tuck in the courtroom (R. T. p. 31, lines 17 - 25). She further testified that the endorsement of her name on plaintiff's Exhibit No. 2 was not in her handwriting and she had given no authority to anyone to endorse the check (R. T. p. 38, lines 14 - 25; p. 39, lines 1 - 6).

Beatrice Reid, a Bank of America teller, testified that she cashed plaintiff's Exhibit No. 2 for Sid Tuck (R. T. p. 56, lines 3 - 25); that Marlene Tashima's name was written on the check when it was presented, but not in her presence; that Sid Tuck endorsed the check in his name in her presence and she cashed it for him (R. T. p. 57, lines 1 - 14).

Gabriel Fierro identified the defendant, Sidney Tuck (R. T. p. 66, lines 1 - 7). He testified that the endorsement which was purported to be his endorsement on plaintiff's Exhibit No. 4 was not his endorsement and that he had not authorized anyone to endorse the check for him (R. T. p. 68, line 25; p. 69, lines 1 - 10). Connie Fierro, Gabriel's wife, identified Sidney Tuck, the defendant, in the courtroom (R. T. p. 79, lines 1 - 19). She testified that the endorsement purported tc be her endorsement on plaintiff's Exhibit No. 4 was not in her handwriting and that she had not authorized anyone to endorse the check for her (R. T. p. 84, lines 7 - 20.

Alyne Sanders, a Bank of America teller, testified that she cashed the check, plaintiff's Exhibit No. 4, for Sid Tuck and that it had the Fierros' signature on it at the time she cashed it. (R. T. p. 95, lines 1 - 25).

Evelyn Martinez testified that her name was now "Wander;" that she had never seen plaintiff's Exhibit No. 9, the United States Government check made out in her name, prior to the trial, (R. T. p. 121, lines 15 - 19). She identified the defendant as Sidney Tuck (R. T. p. 118, lines 6 - 12). She further testified that

the endorsement of her name on plaintiff's Exhibit No. 9 was not in her handwriting and that she had not authorized anyone to endorse the check in her name (R. T. p. 122, lines 4 - 23).

Beatrice Reid, a Bank of America teller, testified that she cashed plaintiff's Exhibit No. 9 for Sidney Tuck (R. T. p. 60, lines 2 - 10).

Inman Eden identified plaintiff's Exhibit No. 12 as having his name on the face of the check, but not his address; that the address on the check was that of Sidney Tuck; that he had never seen the original check prior to the day of trial (R. T. p. 195, lines 9 - 19). He further testified that the endorsement of Inman Eden on the back of plaintiff's Exhibit No. 1 2 was not his signature and that he had not given Mr. Tuck authority to receive his tax refund or endorse his check (R. T. p. 196, lines 7 - 20.

Barbara Landucci, a Bank of America teller, testified that she cashed plaintiff's Exhibit No. 12 for Sidney Tuck; that he received cash for the check and that he endorsed the check in her presence (R. T. p. 205, lines 15 - 25; p. 206, lines 1 - 12).

Willie and Janie Lewis testified as to plaintiff's Exhibit No. 10.

Willie Lewis testified that he had not seen the original check - plaintiff's Exhibit No. 10 - prior to the trial (R. T. p. 133, lines 24, 25; R. T. p. 134, lines 1 - 3). He further testified that the signature of Willie Lewis on the reverse side of the check was not his signature; that he did authorize anyone to endorse the check for him and that he had no arrangement with Sid Tuck or anyone else to cash the check and keep the proceeds (R. T. p. 134, lines 13 - 24 ; R. T. p. 135, lines 1 - 3).

Janie Lewis testified similarly as to plaintiff's Exhibit No. 10; that the endorsement on the reverse side was not her signature and that she had not authorized anyone to endorse it for her (R. T. p. 159, lines 3 - 23).

Rachel Williams, a Bank of America teller testified as to plaintiff's Exhibit No. 10; that she cashed plaintiff's Exhibit No. 10 for Sid Tuck, giving hi.n cash, and that Sid Tuck's endorsement was the only one executed in her presence (R. T. p. 149. lines 14 - 23; R. T. p. 150, lines 1 - 15). She also identified the defendant, Sidney Tuck, as the person she knew as a customer of the Bank of America and for whom she cashed plaintiff's Exhibit No. 10 (R. T. p. 149, lines 14 - 25).

Sally Hughes testified that her name was "Sally Brey" (R. T. p. 98, lines 11 - 14). She testified that the Sidney Tuck present in the courtroom was the Sidney Tuck with whom she was acquainted (R. T. p. 99, lines 1 - 11). She testified that she had never seen plaintiff's Exhibit No. 6, the original check, prior to the day of trial (R. T. p. 102, lines 21 - 25). She further testified that the address on the face of plaintiff's Exhibit No. 6 was not her address (R. T. p. 103, lines 1 - 9). She further testified that the endorsement "Sally Hughes" on the reverse of plaintiff's Exhibit No. 6 was not her signature and that she had never authorized anyone to sign her name to that check (R. T. p. 103, lines 10 - 18). She further testified that she had no agreement with Sidney Tuck for him to get the money from the refund check (R. T. p. 104, lines 4 - 6).

Rachel Williams, the Bank of America teller, testified that she cashed plaintiff's Exhibit No. 6 for Sid Tuck; that she had Tuck endorse the check in her presence and that the name "Sally Hughes" already had been written on the check (R. T. p. 148, lines 1 - 25). She further identified the Sid Tuck whom she knew as a customer and for whom she cashed plaintiff's Exhibit No. 6 as the defendant present in the courtroom (R. T. p. 149, lines 3 - 10).

Sidney Tuck testified that the reason he cashed the checks was that he was being blackmailed by an individual who threatened his parents' lives (R. T. P. 211 - 214); that he did not go to the police because he did not have any faith in them (R. T. p. 215, lines 13 - 16).

ARGUMENT AMPLIFYING GRANTING THE WRIT

I.

The Jury was not properly instructed on the Law of Coercion as a defense to forgery.

The Court's instructions to the jury on the issue of coercion as a defense was an incorrect statement of the law and constitutes plain error within the meaning of Rule 52 (b) of the Federal Rules of Criminal Procedure, Title 18, United States Code; "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the Court."

On the issue of coercion, the Court instructed the jury that:

> "Although coercion or compulsion will never excuse taking the life of an innocent person, it may provide a legal excuse for lesser crimes. In order, however, to provide a legal excuse for any criminal conduct, the compulsion must be present, and immediate, and of such a nature as to induce a well-founded fear of impending death or serious bodily injury; and there must be no reasonable opportunity to escape the compulsion without committing the crime, or participating in the commission of the crime.
>
> "If the evidence in the case should leave the jury with a reasonable doubt whether, at the time and place of the alleged offense, the accused acted, or failed to act, willingly and voluntarily; that is to say, whether the accused was then and there forced, in effect to commit or aid in the commission of the crime charged in the indictment by coercion or compulsion, as just explained, then the jury should acquit the accused.

> "The jury should always bear in mind that the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence." (R. T. p. 306)

The instruction given by the Court was taken from the 1968 Pocket Part of Federal Jury Practice and Instructions by Matthes and Devitt, being Section 10. 13 under the chapter of Act or Omission and Intent.

The instruction makes no mention of a fear of impending death or bodily injury to a near relative or fear for the life of his father and mother was defendant's primary defense.

In the case of Johnson vs. United States, 291 F 2d 150 (1961), the Court approved the following instruction at page 155 "If you find ... he acted because of coercion or compulsion induced by fear of immediate and impending danger of serious bodily harm, either to himself or to a near relative, ...such coercion could excuse the commission of the crime. (emphasis supplied).

Instructions recognizing coercion by fear for the life or well being of a near relative are also recommended in 33 Federal Rules Decision 523, Manual on Jury Instructions -- Criminal, at page 563, in Section 5. 04, and in Federal Jury Practice and Instructions Mathes and Devitt, 1965, at p. 137, in Section 10. 13, paragraph 2, "If the jury should find from the evidence in the case that, at the time and place in question, the defendant did not act, or fail to act, willingly or voluntarily, but only because of coercion or compulsion induced by fear of impending death or serious bodily harm, either to himself or to a close relative, and that there was no reasonable opportunity to escape the compulsion without doing what he did, the jury should acquit the defendant."

As given, the instructions on coercion did not recognize the defense of coercion as presented by defendant. (R. T. p. 212 - 215, 251, 295). "A charge is erroneous if it ignores a defense claimed as to which there is evidence before the jury." Smith vs. United States, 230 F. 2d 935, 939 (1956).

It is urged that this incorrect instruction constitutes "plain error" under Rule 52b of the Federal Rules of Criminal Procedure. It is urged that failure to properly instruct the jury resulted in a manifest miscarriage of justice, and seriously affected the integrity of the proceeding below, warranting reversal. Gilbert vs. United States, 307 F. 2d 322, (1962). cf. Herzog vs. United States 235 F. 2d 664, 667 (1956).

II.

THE JURY WAS NOT PROPERLY INSTRUCTED ON THE ELEMENTS OF FORGERY.

The Court's Instructions to the jury on the elements of forgery were incomplete, and, constitute "plain error" within Rule 52(b) of the Federal Rules of Criminal procedure.

The Court below charged the jury that three essential elements are required to be proved in order to establish the offense of forgery...:

Second, doing such act or acts without authority...(R. T. pp. 310 - 311)

No explanation of the legal meaning of "authority" was offered to the jury. There was evidence before the jury that the defendant thought he had authority to endorse the checks on behalf of his clients. (R. T. pp. 216, 222, 236, 237, 241, 243).

The Supreme Court of the United States has held that forgery under Section 495 of Title 18 U. S. C. is common law forgery, and that "...forgery in

Section 495 should not be taken to include an agency endorsement." Gilbert vs. United States, 370 U.S. 650, 657. Instructions to the jury should have been so formulated that they would provide the jury with a standard against which they could have considered the evidence of agency endorsement offered by the defense. Without an explanation of agency endorsement, the charge, in effect, ignored the defense of agency endorsement as claimed, and is error under Smith vs. United States, supra, and Rule 52(b), Federal Rules of Criminal Procedure.

III.

THE COURT ERRED IN FAILING TO ADMONISH THE JURY TO DISREGARD TESTIMONY TO WHICH OBJECTIONS WERE SUSTAINED.

The court's failure to admonish the jury to disregard testimony to which an objection was sustained is cause for reversal under Rule 52(b), Federal Rules of Criminal Procedure.

Objections by defense counsel to testimony offered on behalf of the prosecution was sustained in this case, (R. T. p. 82) but the judge did not admonish the jurrors to disregard the testimoney. "... an erroneous admission of evidence surmounted excluding the evidence from the consideration of the jury and directing the jurors to disregard it." Conner vs. United States, 322 F. 2d 647 (1963). Since no admonishment was given in the instant case, the error was not cured, and is ground for reversal.

With all due respect to the learned trial judge, the failure to admonish the jury to disregard was error.

As was said in Krulewitch v. United States, 336 U.S. 440 :

> ". . . The naive assumption that prejudicial effects can be overcome by instructions to the jury, all practicing lawyers know to be unmitigated fiction. (Citing cases)".

IV.

PRESENTATION OF THE DEFENSE BY DEFENDANT'S COUNSEL WAS SO INADEQUTE THAT DEFENDANT WAS EFFECTIVELY DENIED HIS SIXTH AMENDMENT RIGHT TO COUNSEL AND AN IMPARTIAL JURY.

Representation of defendant by counsel was so lacking in diligence and competence that defendant was effectively denied his Sixth Amendment right to counsel.

The right to the assistance of counsel has long been recognized. Powell vs. Alabama, 287 U.S. 45, 53 S. Ct. 55, 77 L. Ed. 159 (1932), by taking cogni - zance of a defendant's right to appointed counsel, by implication, condemns a denial of effective and substantial assistance. The right to counsel is so fundamental, that defendants are entitled to Court appointed counsel in federal courts, unless certain exceptions are met. Gideon vs. Wainwright 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 799, (1963). Other Federal Court cases have interpreted the right to counsel as "... the right to effective counsel." McKenna vs. Ellis, 280 F. 2d 592, 599 (1960). The Court continued, saying "We interpret counsel to mean not errorless counsel, and not counsel judged ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance." Ibid. also, United States vs. Rubin, 433 F. 2d 442, 444, (1970), Pineda vs. R. E. Bailey 340 F. 2d 162, 164 (1965).

Other federal courts have formulated a different standard for judging the effectiveness of counsel: "...when the representation of an accused is so lacking in diligence and competence that the accused is without representation and the trial is reduced to a sham, it is the duty of the state to see that the essential rights of the accused are preserved by appropriate intervention." Lance vs. Overlade 244 F. 2d 108, 110 (1957), c.d. Burton vs. United States, 151 F 2d 17. (1945).

In the instant case, the representation given defendant by his counsel was so inadequate that he was not rendered reasonably effective assistance; the trial was, in the final analysis, reduced to a sham. The following points will adquately illustrate this conclusion.

1. Defense counsel did not object to the coercion instruction submitted by the prosecutor to the court, or to the instruction given by the court. Defendant was entitled to instructions embracing his defense.

2. Defense counsel did not object to the instructions given by the court on the elements of forgery. Defendant was entitled to clarifying instructions, so that the jury could have better understood his defense. (R. T. p. 316)

3. Defense counsel failed to request that the Court admonish the jury to disregard testimony to which objections were entered and sustained. (R. T. p. 82).

This is a protection to which defendant was entitle, as discussed herein under Section III of this argument. Failure to protect defendant may have unduly prejudiced his defense.

4. Defense counsel failed to request the Court to exclude government witnesses from the Courtroom. (R. T. p. 185). "The practice of excluding witnesses from the courtroom except while each is testifying is to be strongly recommended. . ." Williamson vs. United States, 310 F. 2d 192 (9th In. 1962). Failure to request exclusion may have unduly prejudiced the witnesses, as they could hear other allegations of wrongdoing by the defendant, and consequently "reinforce" their recollection of what happened to them individually. The danger of creating an "aura of evil" about the defendant also exists in such a situation, perhaps establishing him as a proper subject of damnation, or more certain and critical accusations, than would be the case if the witnesses had been left to testify upon independent recollection.

5. Defense counsel made no request for the prosecution to rest its case at the end of the first day of trial, when prosecuting counsel stated he had run out of witnesses. (R. T. p. 166) Such a request would have enabled defense counsel to preclude the prosecution from presenting additional witnesses against defendant, or, in the alternative, to prepare for additional prosecution witnesses.

6. Defense counsel failed to move for an acquittal at the close of the case. Such a motion would have preserved the defendant's record for an appeal on the issue of sufficiency of evidence, and may have prevented the case from going to the jury.

7. Defense Counsel did not refute the argument of the United States Attorney regarding the law of coercion as a defense. The prosecution misstated the law, saying threats of bodily harm or injury to defendant's parents were not a legal excuse. (R. T. p. 292).

Defense counsel should have refuted his statement, and should have objected to the statement as erroneous and prejudicial, consistent with the law of coercion as a defense.

Nor did defense counsel refute the prosecution's statement in argument that defendant didn't say that his own life was threatened. There was evidence before the jury that defendant also feared for himself, though not so much for himself as his parents. (R. T. p. 215). This was an essential element of defendant's defense, particularly in light of the coercion instruction which was given. Failure to correct the prosecutor's argument may have unduly and adversely affected defendant's defense.

8. Defense counsel should have objected to the instructions given to the jury on the issue of coercion, on the ground they placed the burden of proving coercion upon the defendant. The jury should have been instructed that the prosecution had the burden of proving that the defendant was not coerced, to protect the record for an appeal.

9. Defense cousel made no objection to the decision of the Court and jury to deliberate into the evening. The 26th of March, 1970, was the day before Good Friday. The decision to hold over is susceptible to the inference that the jurors just wanted to have the case done with, so they would not spoil the week-end. Such haste in deliberations is violative of the Sixth Amendment [54] guarantee of a right to trial by a fair jury. To assure such protection, defense counsel should have objected to this hasty procedure, to prevent undue pressure on the jury to reach a quick verdict, or, alternatively, to protect the record for an appeal on the point.

Each of the above points illustrates the inadequacy of counsel. Collectively, they demonstrate that the representation of the defendant was so lacking in diligence and competence that the defendant was without representation. Counsel was merely going through the motions of presenting a defense.

An accused" . . . needs the aid of counsel lest he be the vicitm of overzealous prosecutors, of the laws complexity, or his own ignorance or bewilderment." (citations omitted) Wilson vs Rose 366 F. 2d 611, 614 (1966). In Wilson vs. Rose, retained counsel induced an accused to plead guilty, without fully knowing of or advising the accused of the consequences. The court stated that inadequate counsel had, in that case, prevented the defendant from putting forth a defense, and reversed and remanded the case.

In the instant case, inadequate counsel preclude defendant from putting forth a defense. The defendant should not be forced to bear the burden of counsel's inadequacy at the trial state, any more than at other stages in the proceedings.

V.

THE UNITED STATES ATTORNEY WAS GUILTY OF MISCONDUCT IN THE COARSE OF HIS SUMMARY TO THE JURY.

The Assistant United States Attorney in his argument before the jury misstated the law regarding coercion as a defense. (R. T. 292, Lines 3 - 12).

MR. DAFFER:

> "Since Sidney Tuck himself was not threatened with bodily harm or with any jury and since only his parents were this is not a legal excuse for this crime even if the extortion threats and even if Mr. Tuck's testimony is entirely true about the extortion: even if that's true, that is not a legal excuse for committing these crimes, so I am asking you:
>
> One, not to believe that there ever were any threats but even if you do believe it, it's not an excuse for Mr. Tuck doing what he did; that's what the law says."

We contend that this was in violation of the rule laid down in Vierick v. United State, 318 U.S. 236, 248, quoting Berger v. United States, 295 U.S. 78, 88:

> "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim

> of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor -- indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."

In Tenorio counsel was summarizing testimony and evidence. The appellate court stated that though the prosecutor's summary of testimony was incorrect, it was not prejudicial, because he immediately admonished the jury to use their own interpretation of the evidence already before them. (Tenorio v. United States of America, 390 Fed Rptr 2d 96, 98)

In the instant case the prosecution's summary was highly prejudicial. It was a direct and affirmative misstatement of the law. The jury was not given a correct statement of the law as it applied to the evidence of threats of death or serious bodily harm to a near relative. Defense counsel made no objection as was made in Tenorio. The prosecution did not admonish the jurors that his statement may have been an incorrect statement, as was done in Tenorio. Without some corrective effort on the part of the Court or the attorneys, the jurors were left with the impression that the coercion claimed in this case was not a proper defense. It was more than a prejudicial misstatement, it was clearly misleading the jury as to the actual state of the law.

Conclusion

For the resons stated, we respectfully ask that the petition for writ of certiorari should be granted.

Respectfully submitted,

JOSEPH G. JUE

Attorney for Petitioner
Sidney Tuck

APPENDIX "A"

APPENDIX "A"

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff- Appellee,	)	
vs.	)	NO. 26,344
SIDNEY TUCK, Defendant- Appellant.	)	ORDER

Before: BROWNING and ELY, Circuit Judges, and *THOMPSON, District Judge

Finding no reversible error in the record, the judgment is affirmed.

Dated: September 8, 1971

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*Honorable Gordon Thompson, Jr., United States District Judge for the Southern District of California, sitting by designation.

DECLARATION OF MAILING

STATE OF CALIFORNIA)
) ss.
COUNTY OF SAN FRANCISCO)

MARCIA SOLOMON, certifies:

That she is a citizen of the United States, over eighteen years of age, a resident of the above county and state, and not a party to the within action.

That her business address is 1090 Montgomery Street, San Francisco, California 94133.

That she served the within Petition For Writ of Certiorari by placing a copy thereof in an envelope, postage prepaid, and addressed to:

DWAYNE KEYES, ESQ.
United States Attorney
4005 Federal Building
1130 "O" Street
Fresno, California 93721 and a copy to the

SOLICITOR GENERAL
DEPARTMENT OF JUSTICE
WASHINGTON, D.C. 20530

and depositing the same in the United States mail at San Francisco, California, on October , 1971.

Executed on October 6, 1971, at San Francisco, California, under penalty of perjury.

Marcia Solomon
MARCIA SOLOMON, Declarant

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No. 71-505

In the Supreme Court of the United States

OCTOBER TERM, 1971

SIDNEY TUCK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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After a jury trial in the United States District Court for the Eastern District of California, petitioner was convicted of six counts of forging endorsements on United States Treasury checks and six counts of uttering and publishing the checks, in violation of 18 U.S.C. 495. He was sentenced to one year in prison and a fine of $2,200. The court of appeals affirmed without opinion (Pet. App. A).

The evidence showed in essence that petitioner, as part of his business of bookkeeping and preparing income tax returns, prepared six federal tax returns during the years 1967 and 1968. In each instance petitioner received refund checks intended for the taxpayers. He then cashed the checks after signing the payee's name without authority (Tr. 38-39, 56-57,

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60, 66, 68, 95, 103–104, 122, 134–135, 145–150, 159, 195–196, 205–206, 220, 223, 230).[1]

Petitioner asserted as a defense that he was being blackmailed by a person who had threatened his parents' lives (Tr. 212–215), and that all but two of the checks had been cashed to obtain funds to pay the blackmailer (Tr. 215, 217–218, 223). He testified that the checks payable to the other two taxpayees (Marlene Tashima and Sally Hughes) were cashed as the result of mistaken identity caused by the fact that two clients with similar names had authorized petitioner to cash their checks (Tr. 216, 221–222).

1. Petitioner first contends that the jury was improperly instructed on the law of coercion as a defense to forgery. The court, without objection from petitioner's counsel, instructed the jury as follows (Tr. 306–307):

> Although coercion or compulsion will never excuse taking the life of an innocent person, it may provide a legal excuse for lesser crimes. In order, however, to provide a legal excuse for any criminal conduct, the compulsion must be present, and immediate, and of such a nature as to induce a well-founded fear of impending death or serious bodily injury; and there must be no reasonable opportunity to escape the compulsion without committing the crime, or participating in the commission of the crime.
>
> If the evidence in the case should leave the jury with a reasonable doubt whether, at the

[1] "Tr." refers to the transcript of the trial testimony, contained in two volumes paginated consecutively.

> time and place of the alleged offense, the accused acted, or failed to act, willingly and voluntarily; that is to say, whether the accused was then and there forced, in effect, to commit or aid in the commission of the crime charged in the indictment by coercion or compulsion, as just explained, then the jury should acquit the accused.
>
> The jury should always bear in mind that the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

Although the court did not specifically instruct that legal coercion could result from fear of danger to a near relative as well as to petitioner himself, the instruction is not limited to the defendant and thus covers fear of injury to a relative. Accordingly, there is no basis for objection.

2. Petitioner also contends that the court erred in not defining the phrase "without authority" as it appears in the instructions on forgery (Tr. 310). The term "authority," however, is of common usage and would not likely be misunderstood by the jury. No request was made that the trial judge amplify his instruction in this regard.

3. During trial, one Connie Fierro testified as to information received from Ogden, Utah, concerning her check which petitioner had cashed. When defense counsel objected, the court, in sustaining the objection, said that the testimony "may go out as being hearsay" (Tr. 82). Petitioner asserts that this was reversible error since the court failed to admonish the jury to disregard the testimony. Since there was independent

proof that petitioner had cashed the check made payable to Mr. and Mrs. Fierro (Tr. 95, 220–221)—the crux of the charge under 18 U.S.C. 495—no reversible error occurred.

4. Petitioner asserts, for various reasons,[2] that he was denied effective assistance of counsel.

(a) Among other things, he contends that his representation was inadequate because defense counsel failed to request exclusion from the courtroom of government witnesses. This plainly does not show ineffective assistance of counsel. Moreover, not all witnesses were present during the testimony of others (*e.g.*, Tr. 78–79, 119).

(b) Petitioner contends that counsel was derelict in failing to request the prosecution to rest its case at the end of the first day of trial. The record, however, discloses only that the trial judge desired to recess for the afternoon. There is no indication that the prosecution did not have other evidence for the next day of trial (Tr. 165–166).

(c) Petitioner next contends that defense counsel should have moved for acquittal at the close of the case in order for the sufficiency of the evidence to be reviewable on appeal. There is no close question here as to sufficiency of the evidence. Moreover, the failure to move for acquittal does not preclude the review of the sufficiency of the evidence to prevent a "manifest

[2] Petitioner's first three grounds for his contention of inadequacy of counsel—failure of defense counsel to object to the coercion instruction, failure to object to the instruction on forgery, and failure to request an instruction that the jury disregard testimony to which objection was sustained—are adequately discussed by prior portions of this memorandum.

miscarriage of justice." *United States* v. *Ingman*, 426 F. 2d 973, 976 (C.A. 9); *Rodgers* v. *United States*, 402 F. 2d 830 (C.A. 9); *Maxfield* v. *United States*, 360 F. 2d 97 (C.A. 10); *Garrett* v. *United States*, 356 F. 2d 921 (C.A. 5).

(d) Petitioner argues that defense counsel should have refuted the closing argument of the prosecution (Pet. 14) regarding the defense of coercion. Defense counsel, however, gave his version of the testimony (Tr. 296–297); moreover, the court adequately instructed the jury on this subject (Tr. 306–307). See *Tenorio* v. *United States*, 390 F. 2d 96, 99 (C.A. 9), certiorari denied, 393 U.S. 874.[3]

(e) Petitioner asserts that counsel should have objected to the court's instruction on burden of proof as to the defense of coercion. The record makes clear that the court repeatedly instructed the jury that the burden of proof was on the prosecution (Tr. 302, 305, 314). Indeed, immediately following its instruction on coercion the court charged (Tr. 307);

> The jury should always bear in mind that the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

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[3] Equally without merit is petitioner's contention that the United States Attorney was guilty of misconduct because of his argument to the jury on the elements of coercion as a defense (Tr. 291–292). Any misstatement by the prosecution was cured by defense counsel's own argument and the court's instruction, *supra*.

(f) Petitioner urges that counsel was ineffective in failing to object to the trial court's decision to let the jury deliberate into the evening of the last day of trial. There is no evidence that this prejudiced petitioner. In any event, the failure to object clearly did not constitute ineffective assistance of counsel.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

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